Supreme Court, U. S.
FILED
SEP 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5103

ROBERT CAREY,

Appellant,

against

NEW YORK STATE HUMAN RIGHTS APPEAL BOARD, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF APPELLEES NEW YORK STATE HUMAN RIGHTS APPEAL BOARD AND NEW YORK STATE DEPARTMENT OF CIVIL SERVICE TO DISMISS OR AFFIRM

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Appellees New York State Human Rights Appeal Board ("Appeal Board") and New York State Department of Civil Service ("Department") move pursuant to Rule 16 of the Rules of this Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Court of Appeals of the State of New York on the ground that it presents no substantial federal question.

Opinions Below

The opinion of the Court of Appeals of the State of New York, dated April 5, 1979, is officially reported at 46 N Y 2d 1068. The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department is reported at 61 A D 2d 804. These opinions are included in the Appendix to appellant's Jurisdictional Statement as Exhibits D and C respectively.

Counterstatement of the Case

The State of New York has consistently taken the position that it may reasonably and rationally establish guidelines for sex as a bona fide occupational qualification ("bfoq") as an exception to laws against discrimination. The guidelines created by New York State Civil Service Law ("CSL") § 50.7, challenged herein, state that the Department may limit eligibility for a civil service examination to one sex when the duties of the position involved relate to the institutional or other custody or care of persons of the same sex.

Appellant Carey, a 37 year old male, filed an application for a New York State Civil Service examination given in November, 1975 for the position of Correctional Officer (female), No. 24-330 for which the maximum age limit was 46 years. Appellant's application was disapproved for failure to meet the sex requirement for the job title. There had been an examination given in January, 1975 for Correctional Officer (male) for which the maximum age limit was 37 years.* In 1976, the New York State Department

* The Department establishes the requirements and determines eligibility for the examination of correctional officer but the New York State Department of Corrections administers the examination for the job of correctional officer. The New York State Department of Corrections is not a party herein.

of Corrections administered an examination for Correctional Officer for which all men and women who had not yet reached the age of 37 were eligible. Therefore, the exclusion on the basis of appellant's sex from the November examination resulted in his being totally barred on account of his age, from the position of Correctional Officer. However, appellant does not allege age discrimination as a basis for this appeal.*

Appellant contends the disapproval of his application constituted sex discrimination, thus denying him equal protection of the laws, on two grounds:

1. That CSL § 50(7) is violative of the Fourteenth Amendment of the United States Constitution; and

2. That the classification by sex for the job of correctional officer (female) was not a bfoq and the Department's disapproval of appellant's application for that job was violative of the Fourteenth Amendment of the United States Constitution.

The appellee Appeal Board affirmed the order issued by the New York State Division of Human Rights ("Division") dismissing appellant Carey's complaint against the Department. The Division held that the Department's action did not violate the New York State Human Rights Law ("HRL"). The order was based on findings that CSL § 50.7 correctly permitted the Department to limit eligibility for the examination of Correctional Officer (female) to women if it determined that sex was a bfoq. The order was further based on the Division's findings that

* The Courts below properly refused to entertain the claim of age discrimination raised for the first time by the appellant in his brief submitted to the Appellate Division. The Appellate Division held and the Court of Appeals unanimously affirmed that the claim was not properly before it since appellant had failed to raise it below and had also failed to come forward with any claims of extraordinary circumstances to excuse his failure as required by the Executive Law § 298. [See also, *Matter of Mize* v. *State Division of Human Rights,* 33 N.Y.S.2d 53 (1973); *Matter of Selian* v. *Kelly,* 3 A.D. 2d 669 (2nd Dept. 1957).]

separate announcements were used for each sex to facilitate job analysis, recruitment relative to differing needs in male or female correctional institutions and administration of eligibility lists and appointments and that an examination for correctional officer (male) had been held in January 1975 in the region in which appellant resides.

The Supreme Court of the State of New York, Appellate Division, Second Department found that:

> "The limitation here under attack, established by the administrative action of the Department of Civil Service, and the statute under which it took such action, Section 50 (subd. 7) of the Civil Service Law, are constitutional and consistent with the equal protection clause and the provision of the Human Rights Law and the limitation is a valid occupational qualification under Section 296 (subd. 1), par. [d] of that law. (See *Reed* v. *Reed,* 404 U.S. 71; *Bowe* v. *Colgate-Palmolive Co.,* 416 F. 2d 711; *Matter of Button* v. *Rockefeller,* 76 Misc. 2d 701; *City of Philadelphia* v. *Pennsylvania Human Relations Commission,* 7 Pa. Cnwlth 500)."

The New York State Court of Appeals unanimously affirmed.

ARGUMENT

It is well settled law that there is a strong presumption that a statute duly enacted by the Legislature is constitutional, *Brown* v. *Wichita State University,* 547 P. 2d 1015, app. dsmd. 429 U.S. 806 (1976); *McGowan* v. *State of Md.,* 366 U.S. 420 (1961); *State* v. *Solomon,* 141 SE 2d 818 (Sup. Ct. S. Cal.), app. dsmd. 382 U.S. 204 (1965); *Montgomery* v. *Daniels,* 38 N Y 2d 41, 54 (1975); *Taylor* v. *Sise,* 33 N Y 2d 357 (1975), and that it is the obligation of courts, if possible, to read the statutes so as to preserve their constitutionality. *Rogoff* v. *Anderson,* 34 A D 2d 154 (1970), affd. 28 N Y 2d 880, app. dsmd. 404 U.S. 805

(1971); *People* v. *Harper,* 136 NW 2d 768 (Ct. of App., Mich. 1965), affd. 152 NW 2d 645 (1967), app. dsmd. sub nom. *Harper* v. *Mich.,* 392 U.S. 644 (1968); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.,* 312 F. Supp. 503 (D.N.C. 1970), affd. 402 U.S. 43, reh. den. 403 U.S. 912 (1971).

Appellant contends that the statute is unconstitutional on its face because it permits a classification by sex in violation of the Equal Protection Clause of the Fourteenth Amendment. The appropriate standard to be applied to determine whether the sex-based classifications permitted by CSL § 50(7) are violative of the Equal Protection Clause of the Fourteenth Amendment is the "rational" and "substantial relationship" test: Do the classifications by sex permitted by CSL § 50(7) bear a rational substantial relationship to an important state objective that is sought to be advanced by the operation of these statutory provisions? *Califano* v. *Webster,* 434 U.S. 313 (1977); *Kahn* v. *Shevin,* 416 U.S. 351 (1971); *Reed* v. *Reed,* 414 U.S. 71 (1971); *Royster Guano Co.* v. *Virginia,* 253 U.S. 413, 415 (1920); *National Organization for Women* v. *Goodman,* 374 F. Supp. 247 (S.D.N.Y. 1974); *Matter of Patricia A.* v. *City of New York,* 31 N Y 2d 83, 88 (1972).*

Clearly on its face, the statute bears a rational and substantial relationship to a state objective sought to be advanced by it. Establishing a guideline for bfoq is a well-established, rational government objective. As appellant has pointed out in his brief, provisions for a bfoq as an exception to the law against discrimination are articulated in both the HRL § 296(1)(d) as well as in the guidelines of the Equal Employment Opportunity Commission, *Guide-*

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* While there is a body of opinion holding that a gender-based legislative classification must be subjected to close judicial scrutiny and when challenged can be sustained only if the state demonstrates that it serves a compelling state interest, e.g., Justice Brennan's dissent in *Kahn* v. *Shevin, supra* at 357; this strict scrutiny test has *not* yet been adopted or applied by a majority of this Court.

lines for Discrimination Because of Sex, 129 C.F.R. § 1604.1 (a)(2) (1976). We agree, too, with appellant that CSL § 50.7 is a restatement of HRL § 296(1)(d) and that in substance its sole purpose is to grant the Department discretion to limit eligibility for some examinations on the basis of sex if there is a bfoq. Therefore, it cannot be said that where such discretion is exercised, a violation of equal protection would necessarily occur.

It has been held that bfoq's are valid if certain standards are met. *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977); *Bowe* v. *Colgate Palmolive Co.,* 416 F. 2d 711 (7th Cir. 1969). Physical capabilities, psychological make-up, and climatic conditions should be considered in deciding whether a bfoq is valid, *id.* at 718. A bfoq may also be valid if sexual status is reasonably related to job performance. *Button* v. *Rockefeller,* 76 Misc 2d 701 (N.Y. Sup. Ct. Albany Co. 1973).

In the case at bar, at the time appellant's application was rejected,* the general belief was, that a male correctional officer in a female prison would cause great physical

* Appellant assumes that since the current examination for correctional officer is unisex, the appellees cannot logically or legally argue that at the time appellant applied there was a bfoq. This assumption is erroneous for two reasons. First, the fact that a bfoq exists does not mean that an employer is bound to hire only persons of one sex; it means, however, that if he does, it is not illegal discrimination. (The Department may determine at some future time that it is once again necessary to employ sex as a bfoq. In fact, the Department has already been ordered to restore sex as a bfoq at least with regard to selective work responsibilities of correctional officers. *Forts* v. *Ward,* 434 F. Supp. 946 [S.D.N.Y. 1977], rev. o.g. 566 F. 2d 849 [2d Cir. 1977], on remand slip. op. Docket No. 77 Civ. 1560, November 20, 1978.) Second, December 1975 is the point in time at which the alleged discriminatory act occurred and therefore the rules, regulations and procedures of the Department in effect at that time are the only ones which may be considered relevant in considering the determination of the Appeal Board.

and psychological conflicts among the inmates that a female would not cause. A correctional officer's job requires supervision of all activities and conduct of inmates, often under intimate circumstances, counseling of inmates, and resolving problems and conflicts. These duties require a physical and psychological compatibility with female inmates which a male officer might lack. The necessity to reduce alienation between the correctional officers and the inmates would further be strained by frequent exposure between inmates and officers of the opposite sex. This has been recognized by this Court which has upheld sex as a bfoq in the selection of prison guards under Title VII of the Civil Rights of 1964, *Dothard* v. *Rawlinson* (*supra*).

Furthermore, the inmates' rights should be taken into consideration when the bfoq is scrutinized. As the Appellate Division below emphasized:

> "We are here concerned with persons who are serving terms of imprisonment in correctional facilities in which they are segregated by sex and must be confined under observation and guard at all times; both the needs of the correctional facilities to maintain security by such means as body searches and the needs of the inmates for confinement which involve such matters as baths or showers, medical examination and treatment and their psychological security, which is necessary to promote the rehabilitative phases of their confinement, combined to provide a rational basis and a governmental need for limiting contacts in such circumstances to correction officers of the same sex as that of the inmates."

The lack of dignity and self-respect prisoners feel in general must be reduced as much as possible in order to successfully rehabilitate them. The Department recognized at the time that it was desirable to appoint correctional officers by sex in order to afford the inmates a limited amount of privacy. There can be little doubt that there is

a constitutional right to privacy which is fundamental. *Carey* v. *Population Services Int'l.*, 431 U.S. 678 (1977). Such a right extends to inmates. *In re Long*, 127 Cal. Rptr. 732, 736-737 (Cal. Ct. App. 1976); *Forts* v. *Ward*, *supra*.

In light of the foregoing, CSL § 50(7) is constitutional, the sex classification for the job in question is legal and there has been no denial of equal protection. This appeal, therefore, presents no substantial federal question for this Court's determination and should be dismissed.

CONCLUSION

This appeal should be dismissed, or in the alternative, the decision of the New York State Court of Appeals should be affirmed in all respects.

Dated: New York, New York
September 7, 1979

Respectfully submitted,

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